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# In the Supreme Court of the United States

OCTOBER TERM, 1984

REX J. PRICE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that his acquittal on perjury and tax evasion charges at his first trial collaterally estopped the government from retrying him on a conspiracy charge after his conviction on that charge at the first trial was reversed on appeal.

1. Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was originally convicted of conspiracy to obtain gratuities and to defraud the United States, in violation of 18 U.S.C. 371. The jury acquitted petitioner on two counts of perjury and income tax invasion. The court of appeals reversed his conspiracy conviction on an evidentiary issue (Pet. App. 1b-5b; 722 F.2d 88). Based on a superseding indictment, petitioner was retried and convicted of conspiracy to obtain gratuities, and was sentenced to five years' imprisonment and a $5,000 fine. The court of appeals affirmed (Pet. App. 1a-7a; 750 F.2d 363).

a. Petitioner was an employee of the Army Air Force Exchange Service (AAFES). In that capacity, petitioner accepted cash and dinners from three individuals who owned a company that sold toys to the AAFES. In addition, a former employee of the AAFES shared with petitioner a $1,000 payment that he had received from a supplier. The former employee also told petitioner that he could receive free appliances from another supplier in return for favors. Pet. App. 2a, 2b.

b. At his first trial, petitioner was charged with perjury, tax evasion, and conspiracy. One of the perjury allegations was based upon petitioner's allegedly false declaration that he had never received anything of value from the former AAFES employee and had never received a cash payment. The indictment also charged that petitioner falsely declared that he knew of no AAFES employees receiving money or anything of value from the toy manufacturers. The tax evasion count was based on petitioner's failure to report the bribes as income. The conspiracy count alleged an agreement to obtain unlawful gratuities and to defraud the United States.[1] The jury convicted petitioner on the conspiracy count and acquitted him on the perjury and tax counts.

On petitioner's appeal of his conspiracy conviction, the court of appeals noted the inconsistency in the jury's verdicts (Pet. App. 4b):

> [The jury] found [petitioner] guilty on the conspiracy count, presumably crediting the testimony that he had received gratuities, but acquitted him of the perjury charge and of tax evasion. These results appear to be

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[1]According to the government's brief (at 2 n.1) in the court of appeals on this appeal, the conspiracy count was submitted to the jury in the first trial on the basis of an instruction for conspiracy to obtain unlawful gratuities.

> inconsistent, but they mean at least that the jury was not prepared to find [petitioner] completely culpable.

The court rejected petitioner's argument that the government's proof at trial was inadequate to support the conspiracy conviction, holding that "[t]he testimony of the toy seller and of * * * [the former AAFES employee] were sufficient to take the case to the jury" (Pet. App. 5b). However, it reversed the conviction and remanded for a new trial on the ground that the credibility of government witnesses was improperly bolstered by the statements of an IRS agent.

c. At his retrial, petitioner was again convicted of conspiracy. On appeal, petitioner contended that collateral estoppel barred the government from using evidence in the second trial that had necessarily been rejected by the jury in acquitting him of perjury and tax evasion at the first trial.

The court of appeals affirmed. Noting that the challenged evidence at the retrial "was introduced solely to prove conspiracy * * * and * * * was relevant for this purpose" (Pet. App. 5a), the court held that the inconsistent verdicts in the first trial demonstrated that the jury had not "necessarily determined" (*id.* at 4a) the disputed factual issues in petitioner's favor with respect to the conspiracy charge:

> [Petitioner's] conviction of conspiracy indicates that while the testimony of * * * [the government's witnesses] *may* have been rejected by the first jury for purposes of the perjury and tax evasion charges — possibly as a result of error, misunderstanding or compromise, — it was not rejected as it related to the conspiracy charge.
>
> * * * * *
>
> The conviction in [petitioner's] first trial simply meant that the jury returned an inconsistent verdict — valid

> and supportable — and hence the acquittals as to the other counts are not to be read as a finding of fact favorable to [petitioner] on testimony which overlapped each count.

*Id.* at 5a, 6a (emphasis in original). Recognizing that "collateral estoppel ordinarily does not apply when the offense on retrial is the same offense on which the defendant was convicted in the first trial" (*id.* at 7a), the court concluded that "because [petitioner] was convicted of conspiracy in the first trial, collateral estoppel does not bar the introduction of evidence in the second trial which directly supports the conspiracy, even though the same evidence was offered in the first trial in support of the perjury and tax evasion counts" (*ibid.*).

2. Under the "inconsistent verdict" doctrine, it is well-established that convictions by a jury on some counts at trial are not undermined by inconsistent verdicts of acquittal on other counts. See, *e.g.*, *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984); *Dunn* v. *United States*, 284 U.S. 390 (1932). Without even citing this settled line of authority, petitioner argues that, following the reversal of his initial conspiracy conviction on appeal, the government was collaterally estopped from proving the conspiracy charge at the retrial because the first jury returned inconsistent verdicts acquitting him of perjury and tax evasion. This contention was correctly rejected by the court of appeals and does not warrant further review.

Collateral estoppel "bars relitigation between the same parties of issues actually determined at a previous trial." *Ashe* v. *Swenson*, 397 U.S. 436, 442 (1970). Where a jury reaches inconsistent verdicts, it cannot be concluded that common issues of fact were resolved in the defendant's favor. Rather, " '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction

the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.' " *Powell,* slip op. 7, quoting *Dunn*, 284 U.S. at 393. In this circumstance, "[i]t is * * * possible that the jury, convinced of guilt, properly reached its conclusion on the * * * offense [of which it convicted], and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the * * * offense [of which it acquitted]." *Powell*, slip op. 7. The fact that the defendant was convicted in part clearly indicates that the jury did not conclusively find against the government on the overlapping issues in the various counts.

The Court has recently held that collateral estoppel does not apply to inconsistent verdicts in a single trial. See *Powell*, slip op. 7, 10-11. The Court recognized that the "argument that the acquittal on * * * [one] offense should collaterally estop the Government on the * * * [other] offense * * * necessarily assumes that the acquittal * * * was proper — the one the jury 'really meant' " (*id.* at 10). However, that assumption "is not necessarily correct * * *. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel — which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict — are no longer useful" (*id.* at 11).

The same analysis demonstrates that where, as here, a retrial on a charge follows reversal of an initial conviction,[2] collateral estoppel cannot be used to give preclusive effect to the previous inconsistent acquittals on other counts and thus bar the government from proving at the new trial — as

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[2]Since the government's evidence at the first trial was sufficient, the Double Jeopardy Clause does not bar reprosecution after an appellate reversal of the original conviction. See, *e.g., Tibbs* v. *Florida*, 457 U.S. 31, 41-42 (1982); *United States* v. *Scott*, 437 U.S. 82, 91 (1978).

it did to the satisfaction of the jury in the first trial — that the defendant is guilty of that charge. Because the inconsistent verdicts in the first proceeding do not as a matter of either law or fact establish that the jury resolved the common factual issues in petitioner's favor, the essential predicate for application of the doctrine of collateral estoppel is absent. Contrary to petitioner's argument, there is no basis for according controlling weight to the acquittal portion of the first jury's inconsistent verdicts (see *Powell,* slip op. 10-11) or for allowing a defendant, by obtaining a reversal on appeal of his initial conviction, to bootstrap the inconsistent verdicts into a defense against reprosecution on the charge of which the first jury found him guilty.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Acting Solicitor General*

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